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No. 07-353

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IN THE

Supreme Court of the United States

JOSE SANCHEZ, *et al.*,

Petitioners,

v.

TRIPLE-S MANAGEMENT, CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS TRIPLE-S MANAGEMENT, CORP., TRIPLE-S, INC., SEGUROS TRIPLE-S, INC., SEGUROS DE VIDA TRIPLE-S, INC., INTERACTIVE SYSTEMS, INC., TRIPLE-C, INC., AND ACCESO-SALUD, INC.

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the First Circuit's Opinion affirming the District Court's determination that on the facts of this case discovery was sufficiently advanced to require the Petitioners to show cause why summary judgment should not be granted does not conflict with a decision of this Court or a Court of Appeals.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Triple-S Management, Corp. is a privately held company that does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondents Triple-S, Inc., Seguros Triple-S, Inc., Seguros de Vida Triple-S, Inc., Interactive Systems, Inc., Triple-C, Inc., and Acceso-Salud, Inc., are all wholly owned by Triple-S Management, Corp.

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INTRODUCTION

The Petitioners lost their RICO case before the District Court after it became clear from their own admissions that none of them had suffered the harm alleged in their complaint. This deficiency first came to the District Court's attention during briefing on the Petitioners' motion for class certification. At that point, the District Court did precisely what this Court's decisions required it to do. It gave the Petitioners specific notice of what it found troubling about the Petitioners' testimony, informed the Petitioners that it was considering granting summary judgment because of those deficiencies, and issued an order to show cause why summary judgment should not be granted requiring the Petitioners to come forward within ten business days with whatever evidence they had in support of their claims.

The Petitioners responded to that order with affidavits and arguments. What the Petitioners failed to do, however, was to explain why their own admissions were not fatal to their case, or how any additional discovery could possibly remedy the damage that those admissions caused. The District Court then properly granted summary judgment, and the First Circuit properly affirmed that grant of summary judgment as being entirely consistent both with its own precedents and the precedents of this Court.

Now, in a final effort to revive their dismissed lawsuit, Petitioners have sought certiorari on a single narrow issue among the several issues presented in their appeal to the First Circuit. Reduced to its core, they ask

this Court to determine whether the Circuit Court correctly decided that the District Court had allowed sufficient discovery prior to issuing its show cause order. Whether discovery is sufficiently advanced to allow summary judgment is a case-specific inquiry, but in an effort to recast this case as one that meets the standard of Supreme Court Rule 10, the Petitioners have been forced to ignore or distort the true posture of their case. When this case is viewed in context, the Circuit Court's decision that the District Court acted within its discretion is entirely consistent both with the settled law of this Court and the law of other circuits.

To be sure, the Petitioners have attempted to frame their question more broadly, alleging that they were denied the opportunity to present their case on a "full" evidentiary record. As the Circuit Court recognized, "voluminous" discovery had already occurred in the case and the flaws in the Petitioners' case that resulted in the grant of summary judgment arose from the Petitioners' own admissions. They did not, and could not, explain how any further discovery would undo the damaging nature of those admissions.

Neither this Court nor any Circuit Court has ever held that discovery must be complete prior to consideration of summary judgment – it must only be sufficiently advanced to provide parties opposing summary judgment a fair opportunity to gather and come forward with their evidence. A contrary rule would violate both the text of Federal Rule of Procedure 56 and the policies underlying summary judgment as articulated by this Court. Certainly, the Circuit Court's determination on appeal that the District Court acted

within its discretion in issuing its show cause order is precisely the type of supervisory decision that is both routine and proper. The Respondents thus respectfully request that the Court deny the Petition.

STATEMENT OF THE CASE

This purported class-action lawsuit was brought against Triple-S Management Corporation and its subsidiaries (collectively, including the predecessor corporation, "Triple-S"), all for-profit corporations organized under Puerto Rico law, and other Respondents, for alleged violations of the Racketeer-Influenced and Corrupt Organizations Act ("RICO"). The complaint described a sweeping master scheme (i) to acquire control of the allegedly charitable assets of Triple-S; (ii) to "capitalize" (increase) those assets; and (iii) ultimately to "convert" (distribute) those assets for the benefit of members of the RICO enterprise. (Pet. 5a.) In furtherance of that scheme, Respondents and other members of the RICO enterprise allegedly committed twelve RICO violations, each of which was the subject of a separate count in the complaint as originally filed. *Id.*

Respondents moved to dismiss the complaint, and the District Court eliminated all but four of the claims: Counts IV, VI, VII, and VIII. (Pet. 6a, 33a.) Counts IV, VI, and VIII were based on predicate acts of mail and wire fraud. Count VII claimed predicate acts of extortion under the Hobbs Act. (Pet. 33a.) Petitioners did not appeal dismissal of their other eight RICO claims to the Circuit Court. (Pet. 6a & n.1.)

The remaining Petitioners purportedly represented two classes: a "providers' class," composed of persons who provided medical services or products to patients insured by Triple-S (Pet. 5a); and a "subscribers' class," composed of persons who were insured by or beneficiaries of any medical plan and/or the public health care reform administered by Triple-S (Pet. 5a). The "provider's class" was further divided into four sub-classes: "individual medical doctors;" "medical services association or corporations" (purportedly represented by independence practice associations or "IPAs"); "medical laboratories;" and "pharmacies." (Pet. 66a.)

Following the order of dismissal and Petitioners' subsequent filing of an Amended Complaint, the parties proposed a joint scheduling order that was adopted as an order by the District Court. That order called generally for a phase of class discovery followed by briefing on class certification and a phase of merits discovery, but it had two additional significant features: (1) it expressly acknowledged the parties' understanding that "class certification discovery [would] in part overlap with merits discovery;" and (2) it provided that the parties could file dispositive motions prior to the final deadline for doing so "if they underst[ood] that the issue(s) [were] ripe." (Pet. 16a.)

Pursuant to that order, the parties conducted class-action discovery, which included class-related merits discovery, after which Petitioners' moved for class certification. (Pet. 7a-8a.) In opposing class certification, Respondents called the Court's attention to Petitioners' individual unequivocal deposition testimony that no Plaintiff had suffered any injury because of a RICO

violation. (Pet. 76a.) In light of that showing, the District Court issued an extensive order for Petitioners to show cause why summary judgment for Respondents should not be ordered, explaining why it found Respondents' testimony problematic and what Respondents needed to show in order to forestall summary judgment. (Pet. 55a-78a.) The District Court observed that

> [a]lthough the questions surrounding standing more properly belong in a motion for Summary judgment, they pose a potentially fatal blow to the entire case. . . . Respondents' arguments and the corresponding facts are so compelling that we find it would be a poor use of resources to proceed with class certification . . . without first establishing whether this case is even remotely viable.

(Pet. 56a-57a.)

In its show-cause order, the Court was deeply concerned by the fact that a number of admissions by Petitioners during their depositions clearly contradicted the allegations in the Amended Complaint. For example, the Court pointed out that the following admissions jeopardized the viability of Petitioners' claims:

- Petitioners admitted that letters sent by Triple-S regarding coding practices contained nothing "fraudulent" in them and provided Petitioners an opportunity to submit documentation substantiating a higher fee or code. (Pet. 67a-68a.)

- Petitioners admitted that explanation of payment forms ("EOPs") received by them explained exactly what was going to happen to a claim and contained nothing hidden or concealed. (Pet. 69a.)

- The information provided in the circular letters sent by Triple-S alerted Petitioners to the allegedly fraudulent behavior. (Pet. 69a, 73a.)

- In fact, documentation provided by Triple-S was explicit as to what was being done with Petitioners' claims. (Pet. 73a.)

- Petitioners were unable to identify instances of fraudulent communications associated with the alleged downcoding practices. (Pet. 68a, 70a.)

- Petitioners purportedly representing the pharmacy subclass admitted that Respondents clearly disclosed how and what they were charging in relation to the claim submission process. (Pet. 71a.)

- Petitioners admitted that they had never been threatened with an audit or audited by Triple-S or otherwise had suffered extortion-based injury, an essential element of an extortion claim. (Pet. 69a, 74a, 76a.)

After reviewing these admissions in detail, the District Court then provided Petitioners with a clear listing of what issues they needed to address in order to withstand summary judgment. (Pet. 75a-77a.)

It specifically recognized that full discovery had not yet been completed. (Pet. 77a.) However, the Court was emphatic in stating that, since this case was predicated on allegedly fraudulent communications **delivered to Petitioners**, it was "simply incredible that [Petitioners] are unable to find some evidence to support their claims, if the claims are supportable." (*Id.*) The order to show cause depended wholly on Petitioners own admissions. The Court did not cite a single line of deposition testimony provided by Respondents during class certification discovery. In other words, in their response to the Courts' Order to Show Cause, Petitioners were only up against themselves.

Petitioners responded to the District Court's Order to Show Cause by filing affidavits by them and by two purported "experts." (Pet. 45a, 49a-50a.) Those affidavits failed utterly to offer support for Petitioners' claims of RICO mail fraud and extortion. (54a.) In significant respects, Petitioners' affidavits contradicted their own deposition testimony. E.g., (Pet. 49a.) After receiving Petitioners' response to the Show Cause Order, Respondents' reply and a sur-reply by Petitioners, the District Court issued an extensive Opinion and Order granting summary judgment to Respondents on the four remaining counts, and entered judgment dismissing the case. (Pet. 31a-54a.) That judgment was predicated on Petitioners' failure to overcome the fatal deficiencies in their own testimony. (Pet. 47a-48a, 52a-53.)

REASONS FOR DENYING THE PETITION

The Petitioners insist that both the District Court and the Circuit Court erred by failing to allow them "full" discovery before being required to stave off summary judgment. The Petitioners make this argument without significant analysis of the particular state of discovery in this case, and indeed with barely any reference to the record at all. By doing so, they essentially ask that this Court depart from the context-sensitive determination about how much discovery is appropriate for a given case prior to summary judgment that it has heretofore sanctioned, and adopt a new blanket rule allowing a court to entertain summary judgment only after all discovery is complete.

The Court should decline this opportunity to upset well-settled law in favor of a rule at odds with the text of Federal Rule of Civil Procedure 56 and its own articulated policy behind summary judgment.

A. The Law Regarding *Sua Sponte* Summary Judgment.

The law regarding *sua sponte* grants of summary judgment is well settled. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgment *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Before a court can grant *sua sponte* summary judgment, two conditions must be satisfied: (1) discovery must be sufficiently advanced for the summary judgment target to know what evidence likely can be mustered,

and (2) the target must have received appropriate notice. *Id.*; *Rogan v. Menino*, 175 F.3d 75, 79 (1st Cir. 1999); *see Leyva v. On The Beach, Inc.*, 171 F.3d 717, 719 (1st Cir. 1999); *Berkovitz v. HBO, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996). Here, the Petitioners do not and cannot challenge the adequacy of notice provided by the District Court.

The Petitioners instead contend only that discovery was not sufficiently advanced for the District Court to entertain summary judgment. By doing so, they occasionally give lip service to the "sufficiently advanced" requirement. E.g., (Pet. 16) (acknowledging that this Court has required only "adequate discovery"), (Pet. 17) (acknowledging that in the First Circuit discovery need only be "sufficiently advanced"). In order to attempt to give this argument an air of plausibility, however, the Petitioners primarily urge the Court to impose a standard of "full" or "complete" discovery. E.g., (Pet. 12) ("full evidentiary record"), (Pet. 13) ("complete evidentiary record"), (Pet. 15) ("full evidentiary record," "after full discovery had occurred," and "full discovery record"), (Pet. 16) ("full evidentiary record").

"Full" in the sense of "complete" discovery is not the law. Rule 56 itself provides that a claimant may seek summary judgment "at any time after the expiration of 20 days from the commencement of the action," Rule 56(a), and that a defending party may so move "at any time, Rule 56(b). *Sua sponte* summary judgment – in other words summary judgment initiated by the trial court – is no different provided the party opposing has adequate notice. *Celotex*, 477 U.S. at 325. Indeed,

Celotex, in which the phrase "full discovery" does appear, does not stand for the proposition that discovery must be complete before summary judgment can be granted, as is evidenced by the context from which Petitioners have snatched that language. 477 U.S. at 325. The Court noted in *Celotex*:

> The parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Id. (citation omitted). In this context, it is clear that "full discovery" means the same as "sufficiently advanced," i.e. that "both parties have had a reasonable opportunity to present any material evidence in their favor." *Bank v. Int'l Business Machines Corp.*, 145 F.3d 420, 431 (1st Cir. 1998).

In other words, *sua sponte* summary judgment is proper not only after complete discovery, but also when it is "clear that further discovery would be of no benefit." *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996). In such instances, the record must "reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment." *Id.* One reason this might occur is when the issue presented is purely a "question of law which does

not depend on the development of further facts." *Diaz v. City of Fitchburg*, 176 F.3d 560, 562 n.2 (1st Cir. 1999). Another reason would be that the evidence already adduced in the particular case is dispositive of the merits. That situation is precisely what occurred in this case.

B. The District Court's Decision To Consider Summary Judgment When It Did Was Properly Grounded In Its Determination That Discovery Was Sufficiently Advanced.

Tellingly, Petitioners present their argument without reference to the specific state of the case at the time the District Court issued its show cause order. Petitioners either skirt over or do not disclose the following: (i) that there was extensive deposition discovery of Respondents, Petitioners and others (Pet. 8a); (ii) that the document discovery furnished by Respondents was "voluminous," (Pet. 8a) (iii) that the scheduling order, although it called for the sequencing of discovery with class action discovery first, also provided that dispositive motions could be filed whenever the parties believed the issues were ripe (Pet. 7a-8a); (iv) that the scheduling order acknowledged that there would be a degree of overlap between class-action discovery and merits discovery (Pet. 7a); and (v) that Respondents did not seek via Rule 56(f) an extension of time for further discovery after the show-cause order (Pet. 9a). Most importantly, Petitioners do not disclose that the fatal defects in their case were established by their own testimony — both as to the fraud-based counts and the extortion-based count — and that no conceivable further discovery could affect what Petitioners themselves had admitted. (Pet. 11a-12a.)

It is well-settled that "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesday*, 437 U.S. 463, 469 (1978). The parties acknowledged from the beginning of the case that discovery on class certification and the merits necessarily would overlap. (Pet. 7a.) Without citation to the record, Petitioners allege that intersection between merits discovery and class certification discovery was merely "some minor and insignificant overlap" on "very narrowly restricted issues on the merits." (Pet. 19.) That statement is incorrect, as the above citations to the record demonstrate.

Federal Rule of Civil Procedure 56(f) provides a mechanism for requesting leave to conduct additional discovery before entry of summary judgment. Notably, Petitioners did not invoke that mechanism here.[1] (Pet. 9a.) Even if they had attempted to do so, the effort

1. A motion under Rule 56(f) must, among other things, "set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist," and "indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37, 46 n.4 (1st Cir. 1999) (citation omitted). Petitioners' submission in opposition to the show cause order failed to point out with any level of specificity what facts would be elicited from the number of additional documents they claim they would have requested had discovery continued. Instead, they claimed that the fraudulent scheme was too difficult for a layperson even to comprehend, and that their experts needed to sort through an unidentified mass of discovery before they would even be able to articulate the alleged fraudulent scheme. (Pet. 10a-11a, 44a-45a).

would have been futile. The conclusion that Petitioners have no reasonable likelihood of proving their claims arises directly from their own admissions rather than from any evidentiary issues or defenses raised by Respondents. The District Court correctly ordered Petitioners to demonstrate whether there was any acceptable explanation for the fact that their deposition testimony was fundamentally at odds with the allegations of their Amended Complaint, including the allegations of mail and wire fraud, which Petitioners had the burden of pleading with particularity. Based upon the Petitioners' showing, the District Court ruled as follows:

"In short, the purported named representatives failed entirely to establish standing under RICO, i.e., that they suffered a direct injury as a result of a RICO predicate act." (Pet. 76a.) It found "simply incredible" that Plaintiffs, who supposedly received fraudulent communications and suffered acts of extortion, were "unable to find some evidence to support their claims, if the claims are supportable." (Pet. 77a.) After reviewing Petitioners' submission addressing these deficiencies, the situation was no better. The District Court concluded that the "materials available to us now show unequivocally that Defendants did not engage in either mail and wire fraud or extortion in their dealings with Plaintiffs – both quintessentially 'essential elements' to Plaintiffs' case." (Pet. 36a.)

Taking all these facts together, the District Court's conclusion that discovery was sufficiently advanced to make ruling on summary judgment appropriate was

manifestly correct.[2] Furthermore, the Circuit Court decision that the District Court did not abuse its discretion so holding is beyond reproach.

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2. The Petitioners also appear to suggest that the District Court improperly mingled Rule 23 class certification issues with Rule 56 summary judgment issues. (Pet. 13-14.) That fundamentally misreads the District Court's actions, however. It did not rule that class certification of the claims brought by Petitioners was inappropriate. (Pet. 58a-61a.) Rather, it expressed concern, and ultimately ruled, that **these particular Petitioners** could not proceed with their case at all because **their own admissions** showed that they had not suffered the harm alleged in the Complaint. E.g., (Pet. 75a-77a.) The District Court thus properly set aside the class certification question and required the Petitioners to show cause why summary judgment should not issue against them. (Pet. 61a-62a.) The class certification briefing merely brought the deficiencies in the Petitioners' claims to light. Once those deficiencies were clear, the District Court properly called upon the Petitioners to account for those deficiencies, if they could, by means of the order to show cause. The procedures were clear and distinct for the District Court, and Petitioners' attempt to conflate them is a red herring.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition, and there is none. Respondents therefore respectfully request that the Petition be denied.

Respectfully submitted,

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